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JAMES SALEM,

Petitioner,

-vs-

RALPH KINDER, Sheriff
CUYAHOGA COUNTY

Respondent.

[redacted]

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-112

JAMES SALER,

Petitioner,

- vs -

RALPH KREIGER, Sheriff
CUYAHOGA COUNTY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATUTES INVOLVED

The pertinent provisions of Title 28, United States Code, §2241 (c) are reproduced as Appendix A. The pertinent provisions of Title 28, United States Code §2254 (d) have been reproduced as petitioner's Appendix J.

STATEMENT OF THE CASE

Respondent substantially agrees with the statement of the case as submitted by petitioner. In addition to petitioner's statement of facts it is pertinent to note that the record shows that although there is testimony that the victim, Miss Hill, was very upset following the rape and was crying (R. 126, 211, 212) she readily answered questions when interviewed by police at the hospital (R. 267, 268). Furthermore, in addition to accurately describing her assailants to police at the hospital as both being white males, between twelve (12) and fifteen (15) years of age, one light haired and one dark haired (R. 113-115, 205, 214-215) she also described the type and color of clothing her assailants were wearing (R. 215, 216).

Significant also as stated by the district court below in its memorandum opinion and order (petition A 20, 21):

> "As indicated previously, the victim did not, as part of her direct examination, allude to her pre-trial identifications of petitioner. The prosecutor, however, referred to them in his opening statement (Tr. 25), and the direct testimony of one of the police officers included corroboration of these identifications. No objections were ever entered, however, either to the prosecutor's remarks, or the police officer's testimony. Petitioner's counsel, to the contrary, actively developed the record on these matters, and, in fact, first raised the pre-trial identifications as part of his cross-examination of the victim. Significantly, and as also noted earlier, the state trial court, who would have had to hear the evidence anyway if a proper motion had been made, viewed the pre-trial confrontations as constitutionally suspect."

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS WHICH UNIFORMLY INTERPRET THIS COURT'S OPINION IN *NEIL v. BIGGERS*, 409 U.S. 188 (1972).

This Court in *Stovall v. Denno*, 388 U.S. 293, 302 (1967), stated that due process is violated by a one-on-one pre-trial identification confrontation only when it is found to be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to deny the defendant due process of law. This claimed violation of due process of law must be assessed in light of "the totality of the circumstances" surrounding the confrontation. Nowhere in the *Stovall* decision was a suggestion made, as petitioner would have this Court find, that the suggestiveness of a pre-trial confrontation alone would require the exclusion of testimony concerning the out-of-court identification.

To the contrary, this Court in *Neil v. Biggers*, 409 U.S. 188, 198 (1972) emphasized that it is not the suggestiveness of a confrontation which violates the defendant's right to due process.

> "*It is the likelihood of misidentification which violates the defendant's right to due process*, and it is this which was the basis of the exclusion of evidence in Foster."
>
> (Emphasis Added)

The Court further stated that it was not suggestiveness but the "very substantial likelihood of irreparable mis-

identification" which was to be the standard for determining the admissibility of out-of-court *and* in-court identification testimony.

> "While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as the standard for the admissibility of testimony concerning the out-of-court identification itself."
>
> *Neil, supra,* at 198.

Neil traced the application of the "unnecessarily suggestive and conducive to irreparable mistaken identification" test from the "suggestive identification procedures", *Neil, supra,* at 196, found in *Stovall* to those in *Simmons v. United States,* 390 U.S. 377 (1968); *Foster v. California,* 394 U.S. 440 (1969); and *Coleman v. Alabama,* 399 U.S. 1 (1970). This Court found that each of these cases emphasized the necessity of balancing the suggestiveness of a confrontation against the likelihood of misidentification. The *Neil* Court further noted the expansion of the "totality of the circumstances" test from *Stovall* to *Simmons v. United States, supra.* In *Stovall, supra* at 302, the Court emphasizing the necessity for using a suggestive procedure as "the showing of *Stovall* to Mrs. Behrendt in an immediate hospital confrontation was imperative" focused solely on the circumstances surrounding the confrontation. In *Simmons, supra* at 385, the Court, finding no necessity for the suggestive photographic identification, emphasized its reliability based on the circumstances surrounding the crime. "The robbery took place in the afternoon in a well-lighted bank. The

robbers wore no masks. Five bank employees had been able to see the robber . . . for periods ranging up to five minutes."

While this Court noted that the district court in the *Neil* case had implied unnecessary suggestiveness alone required the exclusion of evidence, it declined to adopt it. Instead, consistent with its previous decisions, it weighed the totality of the circumstances surrounding both the identification by the witness at the time the criminal conduct occurred and the pre-trial confrontation in determining that the identification was reliable even though the confrontation procedure was suggestive.

Petitioner argues, however that

> "if pre-trial suggestive identification procedures and the trial of the defendant occur after the date *Stovall* was decided (the *Neil* trial occurring prior to *Stovall*) then due process requires the exclusion of testimony concerning the out-of-court identification; whether a defendant can prove that, notwithstanding such procedures, the identification is 'reliable' under the totality of the circumstances is irrelevant."
>
> (Petition, p. 10).

Petitioner's theory finds no support in case law. This Court in *Stovall* made no such distinction. And in *Neil*, the Court citing *Simmons* emphasized that the primary evil to be avoided in a pretrial confrontation is not the suggestiveness but "a very substantial likelihood of irreparable misidentification" and it was this standard which was to be used to determine the admissibility of out-of-court and in-court identification testimony. *Neil, supra*, at 198.

Federal courts of appeals have adopted this Court's emphasis on misidentification viewed in light of the totality of the circumstances as set forth in *Neil* and have applied the test uniformly to post-*Stovall* confrontations. See, *United States ex rel. Kirby v. Sturges,* 510 F. 2d 397 (7th Cir.), *cert. denied,* 95 S. Ct. 2424 (1975); *Baker v. Hocker,* 496 F. 2d 615 (9th Cir., 1974); *United States ex rel. Cannon v. Montanye,* 486 F. 2d 263 (2nd Cir., 1973), *cert. denied,* 416 U.S. 962 (1974); *Hastings v. Cardwell,* 480 F. 2d 1202 (6th Cir., 1973), *cert. denied,* 415 U.S. 923 (1974); *United States v. Hurt,* 476 F. 2d 1164 (D.C. Cir., 1973); *United States v. Cooper,* 472 F. 2d 64 (5th Cir.), *cert. denied,* 414 U.S. 840 (1973); *Haskins v. United States,* 433 F. 2d 836 (10th Cir., 1970). Furthermore, two circuits have stated that the Federal Constitution does not require the states to observe the exclusionary rule of evidence that petitioner recommends to-wit: unnecessary suggestiveness requires identification testimony stemming from the pre-trial confrontation to be *per se* excluded. *Kirby v. Sturges, supra; United States ex rel. Pierce v. Cannon,* 508 F. 2d 197 (4th Cir., 1974).

Petitioner states that the decision of the United States Court of Appeals for the Sixth Circuit in the instant case is in conflict with the decision on the same matter with the Fourth Circuit in *Smith v. Coiner,* 473 F. 2d 877 (4th Cir., 1973), *cert. denied,* 414 U.S. 1115. While the exact basis for the court's determination in *Smith v. Coiner, supra,* that the show-up in that case was unnecessarily suggestive and conducive to irreparable mistaken identification is not altogether clear, it is abundantly clear that the Fourth Circuit today embraces the *Neil* formulation that a constitutionally invalid identification confronta-

tion must be unnecessarily suggestive and, in addition, under the totality of the circumstances create a very substantial likelihood of irreparable mistaken identification. In *Pierce, supra,* at n. 11, the Fourth Circuit found the *Smith* distinction between pre-*Stovall* and post-*Stovall* cases without basis and out-of-line with a subsequent Fourth Circuit decision, *Stanley v. Cox,* 486 F. 2d 48 (4th Cir., 1973), *cert. denied,* 416 U.S. 958 (1973), as well as decisions rendered in the other circuits. Rather, the Court held that identification testimony was admissible even though there had been unnecessarily suggestive pre-trial post-Stovall confrontation where under the totality of the circumstances, the identification testimony was reliable.

Thus, respondent submits that there is no conflict among the circuits concerning the test to be applied to determine the constitutional validity of identification confrontation testimony. Rather, the circuits uniformly hold that a constitutionally invalid identification confrontation must be unnecessarily suggestive and, in addition under the totality of the circumstances as set forth in *Neil,* create a very substantial likelihood of irreparable misidentification. This was the standard applied by the district court below and affirmed by the Court of Appeals for the Sixth Circuit in finding that the victim's in-court identification was properly admitted into evidence.

II. THIS COURT HAS CLEARLY DEFINED THE POINT IN TIME AT WHICH AN ACCUSED'S CONSTITUTIONAL RIGHT TO COUNSEL ATTACHES.

As this Court announced in *Kirby v. Illinois*, 406 U.S. 682, 683 (1972), the decisions in the cases of *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967) stand for the proposition,

> "that a *post indictment* pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth (and Fourteenth) Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup." (Emphasis added)

In *Kirby* as in the case at bar, petitioner and a companion were arrested and taken to the police station. The victim of the crime was brought to the station to confront petitioner and his companion neither of whom were advised of the right to counsel nor who asked for or received legal assistance. This Court refused to extend the *Wade-Gilbert per se* exclusionary rule to identification testimony arising from a police show-up which occurred after arrest but prior to the time the defendant had been formerly charged or indicted for a criminal offense. The court concluded:

> ". . . a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. (Citations omitted)
>
> 406 U.S. at 688.

Petitioner does not question that the Court's decision in *Kirby* limited application of the *per se* rule announced in *Gilbert* to the time when adversary judicial pro-

ceedings have been initiated against an accused (petition, p. 15) but contends that the decision does not specifically limit the Court's holding in *Wade* pertaining to the admissibility of in-court identification. However, it is clear that it was the Wade-Gilbert exclusionary rule holding that "no '*in-court* identifications' are admissible in evidence if their 'source' is a lineup conducted in violation of this constitutional standard" (after indictment and in the absence of counsel) (Emphasis Added), *Kirby, supra,* at 683. The Court declined to extend "to identification testimony based upon a police station show-up that took place *before* the defendant had been indicted or otherwise formally charged with any criminal offense". *Kirby, supra,* at 684.

Petitioner asks this Court to further define the point in time at which adversary judicial proceedings are initiated. Respondent submits that this Court has definitively settled this issue,

> "But the point is that, while members of the Court have differed as to existence of the right to counsel in the contexts of some of the above cases, all of those cases have involved points in time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." (Citations omitted)
>
> *Kirby, supra,* at 689.

As the District Court below found, (petition, p. A20)

> "There is no dispute that petitioner was without counsel at the time of the pre-trial identifications. It is clear, however, that these identifications took place almost immediately after petitioner's arrest, and before any formal charges were made against him."

Thus, as in *Kirby*, the pre-trial identifications here occurred during a routine police investigation and not at a critical stage of the prosecution.

III. THE DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT DOES NOT CONFLICT IN PRINCIPLE WITH APPLICABLE DECISIONS OF THIS COURT.

A. THE DECISION BELOW IS IN FULL CONFORMITY WITH THE DECISIONS OF THIS COURT CONCERNING EVIDENTIARY HEARINGS.

28 U.S.C. Section 2254(d) provides in relevant part:

> "[A] Determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear . . .
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing . . . ."

In *Townsend v. Sain*, 372 U.S. 293, 314-315 (1963), the precursor of 28 U.S.C. Section 2254(d), this Court set forth the general standards governing the holding of hearings on federal habeas petitions stating:

> "[T]he possibility of legal error may be eliminated in many situations if the fact finder has articulated the constitutional standards which he has applied. Furthermore, the coequal responsibilities of state and federal judges in the administration of federal constitutional law are such that we think the district judge may, in the ordinary case in which there has been no articulation, properly assume that the

> state trier of fact applied correct standards of federal law to the facts, in the absence of evidence . . . that there is reason to suspect that an incorrect standard was in fact applied."

In the instant case, not only is there no evidence that the State trial judge sitting in his dual capacity of finder of fact and arbiter of the law utilized the wrong standard, but there is every indication he applied the correct standards. He determined, based upon an assessment of the totality of the circumstances

> ". . . . the court is not overly fond of the confrontation method used by the police in their desire to either implicate or let go . . .
>
> * * * * *
>
> . . . . the in-court identification is not tainted by the confrontation, that the identification was independent of the confrontation caused by the police department." (Petition, p. A4).

Although the conclusions of the State trial court were not couched in the exact legal terminology used in *Stovall* and *Neil*, respondent submits that the trial court in actuality found, based upon the totality of the circumstances, that the pre-trial confrontation was not so unnecessarily suggestive and conducive to irreparable mistaken identification as to render inadmissible the victim's in-court identification. Thus, the trial court applied the correct federal constitutional standards.

The District Court in reviewing the two volume transcript of the trial proceedings applied the same constitutional standards and arrived at the same conclusion. Respondent therefore submits that since the opinion of the state trial court met the requirements of 28 U.S.C. Section 2254(d)(1) the burden was thus on petitioner

to establish in the District Court by convincing evidence that the state court's determination was erroneous before being entitled to an evidentiary hearing. *LaVallee v. Delle Rose*, 410 U.S. 690, 695 (1973). This petitioner failed to do.

For the foregoing reasons, respondent submits that petitioner was not entitled to an evidentiary hearing in the district court.

Petitioner cites for the first time in federal court the Ohio case of *State v. Lathan*, 30 Ohio St. 2d 92 (1972) for the proposition that at the time of the trial court's ruling in this case a defendant in an Ohio criminal proceeding had the right to the assistance of counsel at a pre-trial confrontation whether or not such confrontation preceded formal judicial proceedings. Respondent notes initially that *State v. Lathan, supra,* was not the law at the time of petitioner's trial, that case having been decided May 10, 1972, two (2) days after petitioner had been convicted and sentenced. (Petition, p. 4). Furthermore, under the facts of this case, the writ of habeas corpus shall not extend to a prisoner unless he is in custody in violation of the Constitution or laws or treaties of the United States. Title 28 U.S.C. Section 2241(c)(3) (Appendix A, p. 14). It has long been decided that federal courts will not interfere by habeas corpus with a state's administration of its criminal law, unless fundamental rights specially secured by the federal Constitution are invaded. *Rogers v. Peck*, 199 U.S. 425 (1905).

B. THE DECISION BELOW IS IN FULL CONFORMITY WITH THE DECISION OF THIS COURT IN *NEIL V. BIGGERS*, 409 U.S. 188 (1972).

As stated in Argument I, the admissibility of the in-court identification evidence was properly assessed in terms of the totality of the circumstances and the Court of Appeals below correctly affirmed the District Court's conclusion that the pre-trial confrontations did not give rise to such a danger of irreparable mistaken identification as to require the exclusion of the victim's eye-witness testimony. Accordingly, the victim's in-court identification was properly admitted in evidence.

CONCLUSION

No conflict exists among the United States Courts of Appeals as to the interpretation of this Court's decisions in *Stovall v. Denno* and *Neil v. Biggers*. Additionally, the Sixth Circuit below correctly decided that petitioner was not entitled to counsel at the time of the pre-trial confrontation basing its decision on the standards set down in *Kirby v. Illinois*. Furthermore, the Sixth Circuit, using the decisions of this Court as guidelines, correctly determined that petitioner was not entitled to an evidentiary hearing and that the victim's in-court identification was properly admitted into evidence. Wherefore, respondent prays that the petition for a writ of certiorari filed herein be denied.

Respectfully submitted,

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APPENDIX A

Title 28, United States Code, Section 2241(c).

(c) The writ of habeas corpus shall not extend to a prisoner unless —

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.